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In the Supreme Court of the United States

No. 1299.

OCTOBER TERM, 1946.

THE STANDARD OIL COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER, THE STANDARD OIL COMPANY.

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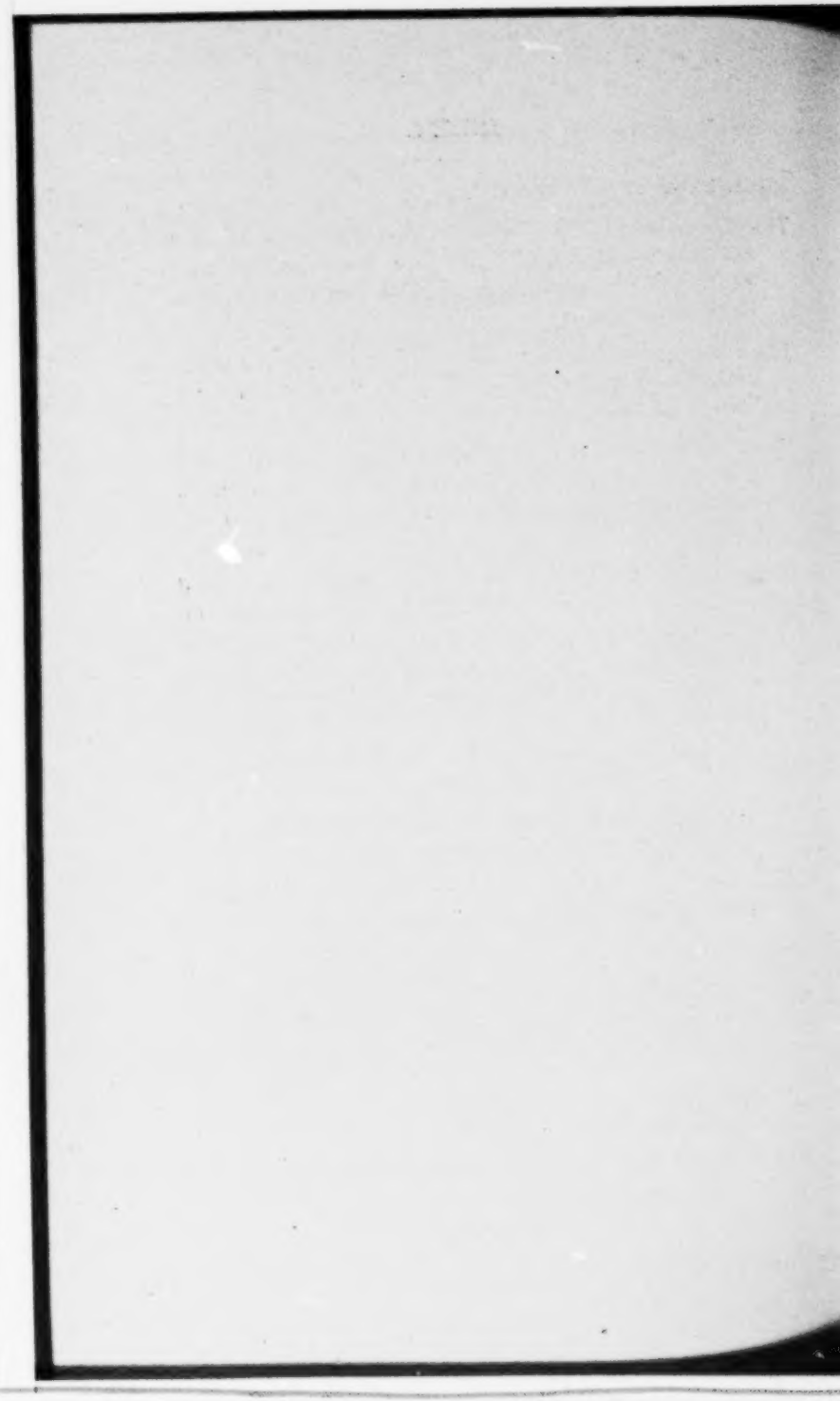

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PRELIMINARY STATEMENT.

Standard agrees with the Attorney General that the immediate question presented is whether the refund claim met the requirements of Section 621(d) of the Revenue Act of 1932, and Article 84 of Treasury Regulation 44. However, Standard insists that the decision of the Circuit Court of Appeals that the claim did not meet these requirements was erroneous, and was in conflict with *Samson Tire & Rubber Corporation v. Rogan, Collector,* 136 Fed. 2d 345, C. C. A. 9 (Writ of Certiorari denied, 320 U. S. 770) in so far as it related to resales of goods sold by Standard to Caldwell, a controlled but not wholly owned subsidiary; and with the cases of *National Investors Corporation v. Hoey,* 144 Fed. 2d 466, C. C. A. 2, and *Page v. Haverty,* 129 Fed. 2d 512, C. C. A. 5, with respect to resales of *all* the

goods sold by Standard to its two subsidiaries. The Circuit Court of Appeals' decision, moreover, gives rise to important Federal questions which have not been but should be settled by the United States Supreme Court.

The Decision of the Circuit Court of Appeals that Standard's Refund Claim Did Not Comply with Section 621(d) and the Applicable Regulations, Was Erroneous.

Even the Attorney General suggests only half-heartedly that Standard did not establish in its refund claim that it did not collect the tax from its subsidiaries. That it did establish this fact appears from the fact that the refund claim expressly alleges (R. 18-22) that Standard alone paid the tax; that its sales to its two subsidiaries were bona fide, valid sales, completed *before* the applicable tax laws went into effect; that the resales of the products sold to the subsidiaries were not made by Standard, but by the subsidiaries, and were all made *after* the effective date of the tax law; that the subsidiaries were independent and autonomous, and were neither divisions, agencies, instrumentalities or the alter ego of Standard; that the Commissioner never asserted a tax with respect to Standard's sales to its subsidiaries but that he assessed a tax only with respect to the *resales* made by the subsidiaries to their ultimate purchasers after such effective date; that the revenue laws imposed a tax only with respect to sales made after its effective date by manufacturers and producers; that Standard was a manufacturer and producer, but that the subsidiaries whose resales were alone assessed were only dealers and not manufacturers or producers, and that they were not subject to tax upon any sales made by them; further, that Standard had not collected any part of the tax from either of its subsidiaries.

In other words, Standard expressly alleged in its refund claim that its sales to its subsidiaries were made before the tax became effective, and that it did not collect the

tax from them;* that the resales on which the tax was alone assessed were made by its independent subsidiaries and not by it, and that it had nothing to do with these resales.

However, the Circuit Court of Appeals' decision holds that in order to comply with Section 621(d) Standard, in addition to establishing in its refund claim that *it* did not pass on the tax to its subsidiaries, must also establish therein that its subsidiaries did not pass on the tax to *their* ultimate purchasers. As Section 621(d) merely requires "the person who paid the tax" to establish that "*he* has not included the tax in the price of the article with respect to which it was imposed," or collected it from the "vendee," it necessarily and admittedly follows that as Standard alone paid the tax, Section 621(d) does not make the additional requirement that it establish in its refund claim that its subsidiaries did not pass on the tax to their customers. The Attorney General, however, contends that the fact that the subsidiaries were respectively jointly assessed with Standard and that they joined in the refund claim with Standard imposes this additional requirement, in that thereby the subsidiaries became "taxpayers" and "refund claimants" within the meaning of Section 621(d), and hence were under the obligations imposed on "taxpayers" by that section. That this contention is without substance or validity appears from the following:

(a) The joining of the subsidiaries in the assessment with Standard was an absolute nullity. The applicable revenue laws imposed the tax only on producers and manufacturers of gasoline and oil, and not

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* The Government admitted in open court that Standard did not collect any part of the tax from the subsidiaries (R. 187-188), and it was stipulated that Standard's prices to the subsidiaries on these sales were as low as those which had prevailed for some time before the applicable tax laws were enacted. (Stipulations 17 and 35, R. 43 and 51.)

upon dealers. Nevertheless, the Commissioner assessed the tax against the subsidiaries although he knew and admitted at the time that they were not then and never had been manufacturers or producers, but only dealers—a fact which was stipulated and was also known to the Circuit Court of Appeals.

(b) The joining of the subsidiaries in the assessment certainly did not make them taxpayers. Whether a person assessed is a taxpayer is a question of fact. As there is nothing in the record indicating that the subsidiaries paid any part of the tax, whereas the refund claim itself (Form 843) shows under the heading "Name of Taxpayer—The Standard Oil Company (Ohio)," (R. 15) and as the sworn statement of the subsidiaries appearing immediately after Standard's refund claim, certifies specifically that the entire amount of tax was paid by Standard and no portion thereof by either of the subsidiaries, it is clear that the subsidiaries were not taxpayers.

(c) Nor is there any warrant for the claim that Standard paid the tax on behalf of the subsidiaries. Standard knew that the assessments against the subsidiaries—seeing that they were not producers or manufacturers—was a nullity, and the assumption that the payments were made in their behalf on an invalid assessment is wholly unwarranted, especially when Standard itself was one of the parties assessed.

(d) Nor does the fact that the subsidiaries joined in the refund claim with Standard and consented "to the granting of such refund—and the payment thereof—to The Standard Oil Company," warrant the conclusion that they were either taxpayers or refund claimants. They joined in the refund claim only as a formal matter because they had been jointly though invalidly assessed and to avoid technical questions be-

ing raised against Standard by reason of their having been jointly assessed. They made no claim for refund for themselves. The fact is they did not even sign or swear to the refund claim itself, as would be required if they had been refund claimants on their own account. Undoubtedly had they attempted to collect any money on Standard's refund claim themselves the Government would have been the first to deny that they had filed a claim for refund on their own behalf.

The above discussion demonstrates that the fact that the subsidiaries were jointly assessed with Standard and joined in the refund claim imposed no obligation on Standard which would not have been imposed upon it had the subsidiaries not been jointly assessed or had they not joined in the refund claim.

Therefore, Standard asserts that it fully complied with the requirements of Section 621(d) and the applicable regulations.

The Facts in the Instant Case are Practically Identical with Those in the Samson Tire & Rubber Corporation v. Rogan.

The above discussion also demonstrates that the joint assessment of the subsidiaries with Standard and their joining in its refund claim added no material element to the instant case (in so far as it related to transactions with Caldwell, a *partially* owned but controlled subsidiary), which was not present in *Samson v. Rogan.* While it is true that in the *Samson v. Rogan* case the taxpaying manufacturer did not sell the tires involved in that case to its *immediate* subsidiary, but to a subsidiary of a top corporation which controlled both the selling and buying corporation, this does not involve a distinction in principle between the instant case and *Samson v. Rogan,* especially as the top corporation "directed," "dictated and arranged"

the sale involved in the *Samson v. Rogan* case. Accordingly, the *Samson v. Rogan* case is practically on all-fours with the instant case on the pertinent facts.

The Attorney General contends that the *Samson v. Rogan* case did not involve a direct decision as to what allegations had to be embodied in the refund claim in order to satisfy the requirements of Section 621(d). That is true. However, the case did hold that by establishing at the trial that the taxpayer had not passed on the tax to his vendees, even though he did not also show that his vendees did not pass on the tax to their ultimate purchasers, the taxpayer had fulfilled all the "proof" requirements of Section 621(d). As the facts which must be proved under the statute at the trial are no different than the facts which must be alleged in the refund claim, it follows that *Samson v. Rogan* in effect held that Section 621(d) did not require the refund claim to embody allegations that the taxpayer's vendees had not passed on the tax to their ultimate purchasers. *Samson v. Rogan* is, therefore, in direct conflict with the decision in the instant case with respect to the allegations which Section 621(d) requires to be embodied in the refund claim.

The Circuit Court of Appeals' Decision in its Entirety is in Conflict with National Investors Corporation v. Hoey, 144 Fed. 2d 466, and Page v. Haverty, 129 Fed. 2d 512.

Standard in its petition herein (pp. 8 to 10) took the position, the correctness of which is confirmed by the foregoing discussion, that as the joint assessment of the nonproducer subsidiaries was a nullity and could therefore in no degree form a basis for the Circuit Court of Appeals' decision, that Court, by requiring Standard to allege in its refund claim that its subsidiaries had not passed on the tax to *their* ultimate purchasers, necessarily and inevitably treated these purchasers as Standard's vendees for purposes of Section 621(d), i.e., treated Standard and its sub-

sidiaries as one, and that the *necessary effect* of the Court's decision (whether it intended this or not), was to hold that *whenever* a parent owned all the voting stock of a subsidiary and a tax benefit might result to either from transactions between them, their separate corporate entities must be disregarded. This conclusion is inevitable when it is considered that in the instant case the subsidiaries were completely independent and autonomous, that the transactions between them and Standard had a sound business purpose, were required to meet competition and were not entered into solely for tax saving reasons.

The decision is therefore in conflict as to transactions involving Caldwell, with *Samson v. Rogan*, and as to transactions involving both Caldwell and Fleet-Wing with *National Investors Corporation v. Hoey*, and *Page v. Haverty*, these latter two cases having held that the separate corporate entities of parent and subsidiaries could not be disregarded where the subsidiaries were engaged in business and not merely in escaping taxation.

The instant decision, moreover, presents the important Federal questions set forth on pages 13 and 14 of Standard's petition.

If the Circuit Court of Appeals' Decision were Based on the Joint Assessment of the Subsidiaries and Not on the Assumed Identity of the Subsidiaries and Standard, it would Enable the Commissioner Arbitrarily to Deprive Courts of Jurisdiction to Consider Many Refund Claims on Their Merits.

If the Circuit Court of Appeals' decision is not based on the assumed identity of Standard and its subsidiaries, but on the fact that the subsidiaries were jointly assessed with Standard, then its effect, if the decision were allowed to stand, would be to enable the Commissioner, *by the simple expedient of assessing the subsidiaries jointly with their parent*, effectively and forever to block the parent

from recovering a tax paid by it on goods sold by it to its subsidiary and resold by the latter, whenever it cannot allege *in its refund claim* that its subsidiaries did not pass on the tax to their ultimate purchasers. This would be true no matter how independent and autonomous the subsidiaries might be, how bona fide and at arm's length, and how sound from a business standpoint apart from any tax saving purpose, all transactions between the parent and its subsidiaries may have been. Indeed, the Commissioner could if the Circuit Court of Appeals' decision were allowed to stand, by the device of the joint assessment, deprive the courts of jurisdiction to pass on the merits of such refund claims even where, as in the instant case, the Commissioner knew, when he joined the subsidiaries in the assessments, that the assessments were not sanctioned by statute and were wholly invalid, they having been made against dealers and not producers.

Standard does not believe this Court will want to place so far-reaching and arbitrary a power in the Commissioner's hands where this is not required by statute.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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